UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

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) Case No. 01-CA-111570
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RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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Dated: April 22, 2014

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

Pontley University)
Bentley University,)
Respondent,)
and) Case No. 01-CA-111570
BENTLEY UNIVERSITY PUBLIC SAFETY ASSOCIATION,)))
Charging Party.)))

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Respondent Bentley University (the "University") submits this brief in support of its exceptions to the Decision and Order of Administrative Law Judge Joel P. Biblowitz dated March 25, 2014:¹

STATEMENT OF THE CASE

On November 29, 2013, Region 1 issued a Complaint alleging that Respondent Bentley University violated Section 8(a)(1) of the Act by failing to allow employee Maria Canino to have a union representative participate in an interview where an objective employee in Canino's position would have reasonable concern that the interview would result in discipline. GCX 1. That this case could grow out of the Supreme Court's decision in *Weingarten* would shock the five Justices in the majority. The University never contemplated or threatened discipline of

¹ Throughout this brief and the corresponding Exceptions, citations to the record shall be as follows: the ALJ's decision shall be "JD [Page]:[Line]"; the hearing transcript from the portion of the hearing shall be "Tr. [Page]"; the General Counsel's exhibits shall be "GCX [Number]"; and Respondent's exhibits shall be "RX [Number]."

Canino. For her part, Canino induced the meeting by expressing "confusion" about a prior meeting and ended the meeting by declaring, "I think we should agree to disagree." GCX 2; Tr. 35. In this sterile field, the Administrative Law Judge ("ALJ") found the sprout of "a reasonable belief" that discipline would occur. While the conclusion is wrong, the better inquiry would be why anybody would conduct the search.

Although the ALJ applied existing precedent as he read it, he reached a result that makes no sense in the present context. It is established fact that the University never intended to discipline Canino, never threatened her with discipline and never disciplined her. As explained more fully below, the August 15 meeting was not investigatory in nature. The University scheduled the meeting to address Canino's own expressed "confusion" over communication issues between her and Sergeant Carmelo Echevarria that had been the subject of two prior informal meetings and which had been resolved to the University's satisfaction. Nobody has suggested that any of the meetings had an "investigatory" intent (as in finding out what happened as opposed to coming to a shared perspective of undisputed facts) or that the subject of discipline was ever raised or considered.

While it is true that two Lieutenants, one the supervisor of Echevarria, the other the supervisor of Canino, attended the August 15 meeting with Canino and Echevarria, the parties sat randomly around the table chatting. Neither the Lieutenants nor Sergeant Echevarria took notes. Nothing about the manner in which the meeting was conducted, nor anything that was said at the meeting (or leading up to the meeting), concerned whether Canino might be disciplined. Certainly, the University held no such belief, nor were the circumstances such that the University could have known that Canino believed she might be disciplined. And if she did

worry about that, unexplained is why neither Canino nor the Union ever inquired about whether discipline was possible.

Because the August 15 meeting was not investigatory in nature and Canino had no reasonable belief that she might be subject to discipline as a result of that meeting, the University did not violate the Act when it refused to allow her union representative to actively participate in that meeting.

STATEMENT OF FACTS

Bentley University has an on-campus police department whose responsibility it is to help keep the campus safe and to respond to calls for assistance from the University's students, faculties and guests. Tr. 11. In June 2013, Bentley University Public Safety Association (the "Union") was certified as the representative of the University police officers. Tr. 11, 51; JD 1. Prior to this time, the officers were not represented by a Union. Currently, the Union represents approximately eighteen University police officers. Tr. 50-51. The University and the Union are in the process of negotiating a collective bargaining agreement. Tr. 50.

At the time of the events relevant to this matter, the organizational structure in the department was as follows: the approximately eighteen police officers reported to nine sergeants, who in turn reported to two Lieutenants - Lieutenant William Williams, who oversaw the operations of the day shift, and Lieutenant Panashe Flint, who supervised the night shift. Tr. 13, 71; JD 1. Officer Canino regularly worked the night shift from 3:00 p.m. to 11:00 p.m. JD 1. Sergeant Carmelo Echevarria regularly worked the day shift from 7:00 a.m. to 3:00 p.m. Given their respective regular shift assignments, Lt. Williams supervised Echevarria and Lt. Flint supervised Canino. Tr. 13, 71.

In addition to their regular assignments, officers could work paid details which usually involved providing an officer at a construction site or other campus event where there might be safety issues. JD 1. On June 28, 2013, Canino was scheduled to work a paid detail at a construction site on campus from 7:00 a.m. until 3:00 p.m., in addition to her regular shift from 3:00 p.m. until 11:00 p.m. Tr. 11, 13-14; JD 1. Canino testified that shortly after reporting to the construction site on June 28, 2013, the detail was canceled because the construction crew did not show up. Tr. 14. Canino testified that rather than leave work at that point, she stayed to do some on-line training and follow-up on a case she was working. Tr. 15. At approximately 10:30 a.m., Echevarria, who was the Sergeant on duty, called Canino to return to the station. Tr. 15-16. When Canino returned, Echevarria informed her that she could not stay until her regular shift started but instead needed to leave and return for her shift at 3:00 p.m. Tr. 16-17. Canino did not feel that this was fair and argued with Echevarria about his sending her home. Canino then stated that she would not return for her regularly-scheduled shift, but would use a vacation day. JD 2:7-8. Echevarria told Canino should could not use a vacation day, but needed to return at 3:00 p.m. JD 2:7-8. Canino testified that she was upset during her conversation with Echevarria and raised her voice to him. Tr. 17, 37; JD 2:9-10. Echevarria believed that the decision as to whether an officer could stay when a police detail was canceled was based on the University's needs and that, in any event, that decision should be made by the sergeant on duty, not the officer assigned to the detail. RX 1. Accordingly, Canino left the University at approximately 11:00 a.m. and returned for her regular shift at 3:00 p.m. Tr. 17-18.

At no time during or after their conversation did Echevarria indicate to Canino that she would be subject to discipline as a result of their interaction, Tr. 37, and there is nothing in the

record that suggests any disagreement about these core facts. At no time after the event was there any investigation of what happened.

Following his discussion with Canino, Echevarria called Lt. Williams to inform him about the interaction between himself and Canino. Tr. 72; JD 3:44-45. Lt. Williams asked Echevarria to write an email explaining what happened. Tr. 72; JD 3:45-46; RX 1. Echevarria did so and Lt. Williams subsequently asked Echevarria to provide some clarifying information. Tr. 72. About two weeks later, on July 10, 2013, Lt. Williams saw Canino at the sergeant's office and asked if he could speak with her. Tr. 73; JD 3:50-51. Both Lt. Williams and Canino agreed that during that meeting they spoke about the cancellation of the paid detail on June 28 and the fact that both Echevarria and Canino were frustrated during their interaction. Tr. 20-21, 39, 73-74; JD 3:51-4:4. Lt. Williams testified that Canino suggested that it would be a good idea for her to speak with Echevarria and "clear it up." Tr. 73. Canino's testimony similarly reflects that she agreed with Lt. Williams that she should speak with Echevarria to clear up any confusion regarding their interaction. Tr. 39. Canino indicated that during this meeting Lt. Williams just wanted to "find out what happened" and that "[h]e didn't seem overly concerned about it." Tr. 21. Canino further testified that her meeting with Lt. Williams was cordial and that he never said that she might be disciplined, nor was she concerned that she might be disciplined. Tr. 22, 38. Rather, she believed that this was simply a misunderstanding between her and Echevarria. Tr. 21.

The following morning after roll call, Canino spoke with Echevarria about her meeting with Lt. Williams. Tr. 23. Canino testified that she told Echevarria they were both frustrated during their conversation in June, but by the end of her discussion with Echevarria she believed

that they had cleared things up. Tr. 23, 40. Echevarria did not raise the issue of discipline during his meeting with Canino. Tr. 41.

Following their conversation, Echevarria emailed Canino and summarized his understanding of their discussion as follows:

I thank you for meeting with Lieutenant Williams and myself regarding the conversation that you and I had last week, where I became concerned at the way you were answering my questions and therefore, I wanted to follow up on this to make sure that, not only we are understanding each other, but that you also understand how to address your supervisor. I am satisfied now that we have addressed the issue and I want to remind you not to hesitate to approach me with any issues, question, concerns that you may have. Thank you Maria.

GCX 2, p. 2. Canino responded by e-mail stating that she was "confused and surprised" at Echevarria's statement "about my understanding on how to address my supervisor." *Id.* Canino then explained her differing understanding of the substance of her conversation with Echevarria and her meeting with Lt. Williams. *Id.* Canino stated in her email: "I think there is some confusion that we have addressed the issue. What issue are you referring too (sic)?". *Id.*

Lt. Williams testified that after reading the exchange between Canino and Echevarria he believed "[t]hat there was still some confusion. And that there needed to be a clarification because there seemed to be a communication issue." Tr. 74; JD 4:4-5. Accordingly, Echevarria emailed Canino stating: "Ok, we need to meet again. You me and the Lieutenants. I'll be more clear next time, because there are obvious issues that need to be addressed and I want to do this in person." GCX 2, pp. 1-2. Echevarria requested that the Lieutenants be present because he reported to Lt. Williams and Canino reported to Lt. Flint. Tr. 73-74.

Because of vacations and weekend work, the first date all four individuals were available to meet was August 15, 2013, now some six weeks after the detail. GCX 2, p. 1; Tr. 75. On August 5, 2013, Echevarria emailed Canino to invite her to a meeting on August 15 and explained the reason for the delay. GCX 2, p. 1; JD 2:51-3:2. The email stated that since they

would all be working on August 15, "let's meet and put any and all issues on the table then." GCX 2, p.1; JD 3:1-2. Canino accepted the invitation and notified Echevarria that her union representative, Officer Kevin McDonnell, had agreed to attend as well. GCX 2, p. 1; JD 3:2-6. McDonnell is the Union President. JD 3:3-4.

The meeting took place in the police department's roll call room which is regularly used throughout the day by the officers for a variety of functions (e.g., shift briefings, interviewing prospective employees, meetings, trainings, lunch, etc.). Tr. 75; JD 3:10-11. The roll call room is an open area with a rectangular table approximately 3 feet by 6 feet. Tr. 43, 76. During the August 15 meeting, Echevarria was seated at the head of the table, Canino was seated to his right, and McDonnell, sat to Echevarria's left. Lt. Williams sat two chairs down from McDonnell and Lt. Flint was seated at the other end of the table. Tr. 43, 76. Neither the Lieutenants, Echevarria nor Canino took notes during the meeting. Tr. 44, 77; JD 4:8-9.

All witnesses testified that during the meeting Canino and Echevarria were given an opportunity to present their view of what happened following the June 28 detail. Tr. 35, 44-45, 58-59. Canino testified that she and Echevarria both gave their sides of the story and that "it was the same thing over and over and over again." Tr. 35. Echevarria again expressed that he felt that it was up to the supervisor to make certain decisions, not the officer (*i.e.*, it is the sergeant's decision whether an officer can stay on the job when a scheduled detail is canceled). Tr. 59.

At this point, McDonnell interrupted and attempted to get clarification of Echevarria's statement, but was told that he was there to observe, not to participate. Tr. 59. McDonnell, who Canino testified said he had a right to speak, then offered a sheet with case law on it to Lt. Williams who declined to take the document. Tr. 59-60. McDonnell then threatened to file an unfair labor practice charge, but did not indicate that he thought the meeting was a disciplinary

meeting or give any other basis for threatening to file a charge. Tr. 78-79. In fact, at no time did McDonnell inquire whether the meeting was an investigatory or disciplinary meeting, nor did Canino or McDonnell, either before or during the meeting, ever inquire as to whether Canino might be subject to discipline. Tr. 77-78. McDonnell acknowledged that prior to the meeting he spoke to the Union's attorney and as a result understood about "Weingarten" and that an employee had rights under Weingarten only in disciplinary meetings. Tr. 62. Despite having this knowledge, McDonnell never asked whether the August 15 meeting was a "disciplinary meeting." Tr. 62-63, 60.

Canino testified that after about forty-five minutes of discussion, she said, "I think we should agree to just disagree. This is just going on. Nothing's being accomplished." Tr. 35; JD 3:19-20. Lt. Williams asked Echevarria if he felt the situation was resolved and Echevarria responded that he felt that it was. Tr. 60. Canino testified that at the end of the meeting Lt. Williams also told her that "when a supervisor tells you to do something, you need to do it." Canino asked Lt. Williams: "If I felt as though I'm being disrespected though and treated in a manner where it's inappropriate can I defend myself?" Lt. Williams responded, "Yes." Tr. 35. Despite Echevarria's statement that the situation was resolved, McDonnell then asked for additional clarification as to whether this was going to be the end of any more talks or emails. Tr. 60. Lt. Williams again instructed McDonnell it was not his role to participate in the meeting and that he was there as an observer. Tr. 60. The meeting ended at that point. Tr. 60-61.

The University imposed no discipline on Canino as a result of the June 28 incident. Tr. p. 45. Canino acknowledged that no one discussed any possible discipline with her between June and the August 15 meeting and that she never asked about any possible discipline. Tr. 45. Lt.

Williams testified that he did not consider the August 15 meeting to be investigatory or disciplinary in nature, and that no discipline was ever considered. Tr. 77, 82; JD 4:9-11.

QUESTIONS PRESENTED

- 1. Was the meeting that took place on August 15, 2013, an "investigatory" interview such that Canino was entitled to have a Union representative participate in the meeting? (*See* Exceptions $\P \P 3, 4, 7, 9, 10, 11$).
- 2. Did Canino have a reasonable belief from an objective standpoint that discipline might result from the August 15 meeting such that she was entitled to have a Union representative participate in the meeting? (*See* Exceptions ¶¶ 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13).
- 3. Did the Charging Party have an obligation to put the University on notice that it considered the meeting to be investigatory or disciplinary in nature? (*See* Exceptions ¶¶ 11, 12)

LEGAL ARGUMENT

I. Introduction

In short, the August 15 meeting was not investigatory and no reasonable person could believe that it might result in discipline. The meeting was a culmination of discussions, none of which raised the specter of discipline. The August 15 meeting came about in response to an email from Echevarria to Canino indicating that he believed all issues had been satisfactorily addressed; Canino stated that she remain "confused." GCX 2. Prior to this email exchange (and after), no discipline was ever discussed. Tr. 45. Canino met with Lieutenant Williams to discuss the June 28 detail incident and followed up that discussion with a conversation with Echevarria. Tr. 20-21, 39, 73-74; JD 2:14-24. Canino acknowledged that she did not believe she would be subject to discipline as a result of either of these discussions. Tr. 22, 38. Nonetheless, the ALJ opined that Canino's conversation with Echevarria "should have settled the matter," and faults

Echevarria for subsequently sending an email to Canino summarizing his understanding of their discussion. JD 4:37-38. Putting aside whether the Act could be violated by extending a discussion, nothing in Echevarria's email suggested any discipline and, to the contrary, specifically stated that Echevarria was satisfied that the issue had been addressed. GCX 2. Canino's reply stated that she remained confused and asked for clarification, hardly a sign that she feared discipline. This led Echevarria to set up the August 15 meeting. GCX 2.

It is important to recognize that the facts relating to the June 28 incident were known to all and not disputed. Echevarria and Canino had a disagreement on June 28 regarding whether Canino could choose to stay and work until her regular shift began, despite the fact that her assigned detail was canceled, or whether Echevarria could require that she go off duty and return later for her regularly scheduled shift. JD 2:1-12. Canino acknowledged that during her discussion with Echevarria she was frustrated and yelling. JD 2:11-12. Echevarria and Lt. Williams both spoke with Canino about the issue and felt that it was resolved. JD 2:14-23; JD 3:50-4:3. What remained at issue and what Echevarria and Lt. Williams sought to address in the August 15 meeting was the differing perceptions expressed by Canino and Echevarria related to their discussions. JD 4:3-5.

Following her initial meetings with Lt. Williams and Echevarria, nothing occurred that would lead a reasonable employee to believe she might be disciplined. There was no ongoing investigation. As set forth above, the facts related to the June 28 detail were never in dispute. After receiving Canino's email indicating she remained confused about the issues previously discussed, Echevarria sought to resolve the ongoing communication issue by sitting down with Canino and their respective supervisors to sort things out and "put any and all issues on the table." GCX 2. The ALJ opines that "if [Echevarria] wanted to have a meeting simply to

address obvious issues, the appropriate manner of doing so would be for [Echevarria and Canino] to meet again" and that the inclusion of Lt. Williams and Flint in the August 15 meeting gave Canino reasonable cause to believe that she might be disciplined. JD 5:3-6. Contrary to the ALJ's conclusion, including Lt. Williams and Lt. Flint in the August 15 meeting did not alter the fact that the meeting itself was not investigatory, nor does it change the fact that the University never contemplated any discipline and had no reason to believe that Canino thought she might be disciplined.

The purpose of the August 15 meeting was to resolve an ongoing communication issue between Echevarria and Canino. Tr. 74; JD 4:3-5. Canino had discussed the underlying issue with Lt. Flint and Echevarria separately without resolution on Canino's part. JD 2:1-23; GCX 2. Bringing everyone together in one place to sort it out, was a logical next step. Nothing in Echevarria's communications with Canino suggested otherwise or would lead a reasonable person to believe they might be disciplined. GCX 2. The informal nature of how the meeting was conducted further buttresses the University's position that it was not conducting an investigation or holding a disciplinary meeting. Tr. 75-77. The fact that neither Canino or her Union representative ever inquired about discipline further undermines any purported belief that discipline might occur. Tr. 77-78. The search for a "reasonable" fear of discipline in this context is senseless.

II. The Weingarten Standard

Employees have a right to the presence of a Union representative during a supervisory investigatory-disciplinary meeting. In *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), "the Supreme Court upheld the Board's construction that Section 7 of the Act creates a statutory-right in an employee to refuse to submit without union representation to an interview which he

reasonably fears may result in discipline." *General Elec. Co.*, 240 NLRB 479, 479-80 (1979). In defining the contours of this right, the court made clear that "[a]n employee's right to representation is limited to situations in which the employee reasonably believes that the investigation will result in his discipline." *Id.* at 480. Whether an investigatory interview may lead to discipline is an objective inquiry based upon a reasonable evaluation of all the circumstances and should not include a "probe of an employee's subjective motivations." *Weingarten*, 420 U.S. at 257, n.5 (quoting *NLRB v. Gissell Packing Co.*, 395 U.S. 575, 608 (1969)).

A. The August 15 Meeting Was Not "Investigatory"

The ALJ has converted the "objective" *Weingarten* standard into an excuse to ignore reality. A typical *Weingarten* case involves a situation where an employee has been accused of some type of wrongdoing and the employer interviews the employee to determine the facts and whether any wrongdoing occurred. *Weingarten*, 420 U.S. 251. As set forth above, the only purported investigatory meeting at issue here, is the August 15 meeting. It is undisputed that by the time that meeting occurred, the facts of the June 28 detail incident were established and that no one had raised the potential that discipline could result. Tr. 77, 82. Notably, Echevarria, the supervisor who initially took issue with the manner in which Canino handled the June 28 incident indicated to her, prior to that meeting, that the issue had been addressed to his satisfaction. GCX 2. Canino, however, stated that she was still confused as to the issue and sought additional clarification. *Id.* Accordingly, Echevarria arranged the August 15 meeting. *Id.* Nobody suggests that Canino and Echevarria disagreed about what happened.

At that meeting, Canino, her union representative, Echevarria and the two Lieutenants sat around a table in the roll call room and discussed the June 28 incident. Tr. 35, 44-45, 58-59.

Despite the known propensity for police officers to document everything, none of the supervisors took notes, Tr. 44, 77, hardly testament to the proposition that there was an investigation going on. The supervisors did not question either Canino or Echevarria, but allowed them to present their viewpoints in an effort to clear up the communication issue. Tr. 44-45. At the end of that meeting, Canino indicated that they would have to "agree to disagree;" further supporting that she did not think that this was an investigation. Tr. 35; JD 3:18-20. This type of discussion between an employee and her supervisors is not the sort of investigatory meeting to which Weingarten applies. See e.g., Success Village Apartments, Inc., 347 NLRB 1065, 1071 (2006) (Weingarten right to representative not applicable where interview "had no investigatory aspect.").

B. Canino Did Not Have An Objective Belief That Discipline Would Result From The August 15 Meeting

As set forth above, an employee's right to have a union representative present is only triggered if the employee reasonably believes that discipline may result – this inquiry is objective and is not concerned with the employee's subjective beliefs or motivations. *Southwestern Bell Tel. Co.*, 338 NLRB 552, 557 (2002) (citing *Weingarten*, 420 U.S. at 257, n.5). Here, the ALJ focused on Echevarria's July 11 email to Canino and the presence of Lt. Williams and Flint in the August 15 meeting in concluding that Canino had a reasonable belief that discipline might result from that meeting. JD 4:49-5:6. The University excepts to that conclusion.

1. The Email Communication Between Echevarria And Canino Does Not Support The ALJ's Finding That Canino Had A Reasonable Belief That Discipline Could Result From The August 15 Meeting.

First, the ALJ opines that Echevarria's conversation with Canino on July 11 should have settled the matter and that there was no need for Echevarria to send the July 11 email to Canino. JD 4:37-41. The ALJ treated Echevarria's email not as a summary of what Echevarria believed

had been discussed and addressed, but rather as a further attempt by Echevarria to address ongoing issues. JD 4:36-40; GCX 2. In doing so, the ALJ ignores the beginning of the email which makes clear that Echevarria is addressing the prior incident and discounts Echevarria's conclusion that "I am satisfied now that we have addressed the issue" GCX 2. It is clear from the July 11 email, however, that Echevarria believed that Canino's discussion with Lt. Williams and her follow-up discussion with him had resolved his concerns. *Id.* Echevarria's email did not indicate that Canino would be subject to discipline as a result of her conduct, nor did it even contain any language that further incidents may result in discipline. *Id.* Given these facts, Echevarria's email does not provide objective support for a belief that Canino might be disciplined for her actions on June 28.

What triggered the August 15 meeting was Canino's response to this email objecting to Echevarria's characterization of her meetings and stating that she was "confused and surprised" at Echevarria's statements regarding how she should "address her supervisor" – hardly proof that she feared discipline. To the contrary, Canino's email forcefully outlines her perception of the meetings she had with Lt. Williams and Echevarria. GCX 2. She concluded her email by stating: "I think there is some confusion that we have addressed the issue. What issue are you referring too (sic)?" *Id.* After receiving this email, Echevarria responded to Canino noting that there were issues that still needed to be addressed (*i.e.*, their differing perceptions of what had been previously discussed). *Id.* Nothing in this subsequent email or Echevarria's email scheduling the meeting and noting that all issues would be "put on the table," suggests, even remotely, that the University was considering taking disciplinary action.

Second, the subject matter of the August 15 meeting involved the same facts as the prior meetings with Lt. Williams and Echevarria. From an objective standpoint, it is difficult to

understand why Canino would suddenly fear discipline at the August 15 meeting when the issue had been addressed numerous times by Canino's superiors with no mention of discipline. This is particularly true here where the incident was not the subject of any ongoing investigation and Echevarria had already stated that the issue had been addressed to his satisfaction. *Id*.

2. The Lieutenants Participation in the August 15 Meeting Is Not Sufficient To Create A Reasonable Belief That Discipline Might Occur

The ALJ's opinion also relies heavily on Lts. Williams and Flint's attendance at the August 15 meeting to support his finding that Canino had a reasonable belief that discipline might result. JD 5:5-7. Again, given facts of this case, the ALJ's conclusion is not warranted. As set forth above, Canino had already met with Williams to discuss the June 28 incident. JD 2:14-21. She testified that her meeting with Lt. Williams was cordial, that he was not overly concerned about the incident and that he never indicated that she might be disciplined as a result of her conduct. Tr. 21-22. Given that nothing was investigated or discovered between her initial meeting with Lt. Williams and the August 15 meeting, his inclusion does not objectively support a reasonable belief that Canino would likely be subject to discipline during the August 15 meeting.

The ALJ also opines that the inclusion of the Lieutenants was not necessary and that if Echevarria wanted to address issues with Canino, the only proper way to do so would be to meet with her individually. JD 5:3-4. The flaw in that argument is that prior to the August 15 meeting, Lt. Williams and Echevarria had already met with Canino individually and believed that they had addressed Echevarria's concerns relating to the June 28 detail, and that Canino understood those concerns. Canino's July 14 email indicated that was not the case. GCX 2. Instead of repeating what had proven to be unsuccessful, Echevarria decided it would be more productive to have his supervisor and Canino's supervisor attend the meeting. The Lieutenants

attended to facilitate communication between the employees - a result Canino and Echevarria were unable to accomplish on their own. Given the fact that the underlying issue had been addressed previously without any discipline, the presence of the two Lieutenants at the August 15 meeting was not sufficient to establish a reasonable belief on Canino's part that she might be subject to discipline at that meeting. *Southwestern Bell Tel. Co.*, 338 NLRB at 552 (ALJ declined to find that employee had reasonable belief that discipline might occur because a request to meet with particular superior was out of the ordinary, where no evidence was offered that a meeting with this superior might lead to discipline).

3. The Union Should Not Benefit From Its Conduct

Finally, the University urges the Board to look at this case in context of the parties' relationship at the time the events occurred. These events took place within weeks of the Union being certified. The parties had not negotiated a contract and the supervisors had no prior experience with respect to the intricacies of a union member's *Weingarten* rights. The one person who understood how *Weingarten* might conceivably apply in this situation - the Union President, Officer McDonnell - never asked whether the meeting could result in discipline. Tr. 60, 62-63. Why? Because everyone involved in the meeting understood that it would not.

The August 15 meeting followed two previous discussions where there was no hint of discipline. The General Counsel now maintains that after receiving Echevarria's July 11 email, Canino could reasonably believe she might be subject to discipline. Her response to Echevarria's email belies this assertion. The August 15 meeting had one purpose - to give Echevarria and Canino an opportunity to discuss their communication issues. Their respective supervisors were there to facilitate the discussion. The conduct of everyone in the meeting reflects that they had a shared belief that this was not part of an ongoing investigation or

disciplinary meeting. Canino and McDonnell were interspersed among the officers, none of the supervisors took any notes, and there was a dialogue back and forth between Canino and Echevarria. In view of these facts, there is no doubt that everyone sitting around chatting understood this was not an investigatory or disciplinary meeting.

If McDonnell were truly concerned that Canino might be disciplined and was entitled to union representation, one would have expected him to address that issue head-on. McDonnell did not. Instead, he interrupted the meeting and when told he could not participate, offered non-lawyers "cases" and threatened to file an unfair labor practice charge. Tr. 59-60, 78-79. The supervisors, who had no reason to believe that McDonnell had a right to participate, declined to take the cases and did not allow him to participate. Tr. 59-60. Nothing leading up to the August 15 meeting put the University on notice that Canino believed she might be disciplined. Her actions do not support this assertion and neither she, nor her representative, ever asked whether she might face discipline.

If there were a genuine fear of discipline, the Union would have asked the question, rather than focus on perfecting the instant charge. For the ALJ to engage in an analysis of whether the University should have known that Canino "reasonably" feared she might be disciplined under the present circumstance, where there was no investigation and no suggestion of discipline, amounts to an intellectual exercise divorced from the reality of the facts.

The University respectfully requests that the Board not reward the Union for engaging in tactics that seem designed only to create acrimony, rather than foster a productive relationship between the Union, its members and the employer.

C. The Issue In This Case Is De Minimis

Finally, the purported issue that arose between the parties in this case should be treated as

de minimis – the legal maxim that the law does not concern itself with "trifles." Black's Law

Dictionary (9th edition 2009). This case concerns a series of routine discussions between an

employee and her supervisors, the purpose of which was to resolve an ongoing communication

issue. As set forth above, a specter of discipline never existed and the facts suggest that the

Union only sought to interject itself into this process so that it could entrap the University into

committing a purported violation of the Act. It is unclear why the General Counsel sought to

pursue this case, where there is no evidence to support that the University conducted an

investigatory or disciplinary interview and where no discipline was ever given. Affirming the

ALJ's decision would allow the Union to turn every routine interaction between the University

and its employees into a potential unfair labor practice. This result would contradict the purpose

and spirit of the Weingarten decision.

CONCLUSION

For all the reasons set forth above, Respondent Bentley University respectfully requests

that the Board grant its exceptions and dismiss the Complaint in its entirety.

Respectfully submitted,

BENTLEY UNIVERSITY

/s/ Arthur G. Telegen

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Dated: April 22, 2014

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CERTIFICATE OF SERVICE

I certify that on April 22, 2014, I caused copies of the **Respondent's Brief in Support of Exceptions To The Administrative Law Judge's Recommended Decision** to be served upon the following by the NLRB's e-filing system:

National Labor Relations Board 1099 14th Street, N.W. Washington, DC 20570-0001

I hereby certify that on April 22, 2014, I emailed the foregoing **Respondent's Brief in Support of Exceptions To The Administrative Law Judge's Recommended Decision** to the following in accordance with Board Rules & Regulations Rule 102.114(i):

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